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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1081

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioner*

v.

WASHINGTON TERMINAL COMPANY, *Respondent*

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF FOR RESPONDENT WASHINGTON TERMINAL COMPANY IN OPPOSITION

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## BRIEF FOR RESPONDENT WASHINGTON TERMINAL COMPANY IN OPPOSITION

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### OPINIONS BELOW

The unreported findings of fact, conclusions of law and Order of the United States District Court for the District of Columbia, and the yet unreported unanimous decision of the United States Court of Appeals for the District of Columbia Circuit, affirming the Order of the district court, are set forth in the Appendix to the Petition (pages A1-A44).

## JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

## QUESTION PRESENTED

Whether, within the contemplation of Supreme Court Rule 19, a question of national importance warranting review by this Court is presented where the court below, following the criteria for distinguishing "major" and "minor" disputes under the Railway Labor Act established by the unanimity of decisions of this Court and the various circuit courts, found the carrier's implementation of the recently agreed upon "incidental work rule" according to its express terms to be a "minor dispute" involving only a question of application or interpretation of the newly-existing agreement entered into by the union, which was enacted into law pursuant to Public Law 91-226 by reason of another union's refusal to execute the same formally.

## STATUTES INVOLVED

The statutes involved are adequately set forth in the Appendix (pages A45-A55).

## STATEMENT OF THE CASE

The International Brotherhood of Electrical Workers, plaintiff in the district court, sought to restrain the Washington Terminal Company from implementing the so-called "incidental work rule" contained in the "Memorandum of Understanding" dated December 4, 1969, which the Congress of the United States, by virtue of Public Law 91-226 (84 Stat. 118), legislated ". . . to the have the same effect . . . as though

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arrived at by agreement of the parties under the Railway Labor Act . . ."[1]

For its statement of the case in connection with this Petition, the Respondent Washington Terminal Company respectfully directs the Court's attention to the history, facts and chronology set forth in the Opinion of the United States Court of Appeals (Petitioner's Appendix A, pages A1-A40).

The crux of the legal issues below was concerned with the application of the "incidental work rule", which provides in pertinent part as follows:

> "At running repair work locations which are not designated as outlying points where a mechanic or mechanics of a craft or crafts are performing a work assignment, the completion of which calls for the performance of 'incidental work' (as hereinafter defined) covered by the classification of work rules of another craft or crafts, such mechanic or mechanics may be required, so far as they are capable, to perform such incidental work provided it does not comprise a preponderant part of the total amount of work involved in the assignment. Work shall be regarded as 'incidental' when it involves the removal and replacing or the disconnecting and connecting of parts and appliances such as wires, piping, covers, shielding and other appurtenances from or near the main work assignment in order to accomplish that assignment. Incidental work shall be considered to comprise a preponderant part of the assignment when the time normally required to accomplish it ex-

[1] The IBEW, as well as two other unions, had agreed to the Memorandum of Understanding. The Sheet Metal Workers, after initialing the same, refused to execute the agreement. Because of the nationwide strike threat, Congress enacted Public Law 91-226.

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> ceeds the time normally required to accomplish the main work assignment. In no instance will the work of overhauling, repairing, modifying or otherwise improving equipment be regarded as incidental."[2]

The "incidental work rule" by virtue of Public Law 91-226 became binding on a national basis between the Respondent (among other carriers) and the Petitioner (together with three other shop craft unions).[3]

Shortly after the enactment of Public Law 91-226 an identical "incidental work rule" was agreed to between the various carriers (including the Washington Terminal Company) and the Brotherhood of Railway Carmen. Thereafter, the Washington Terminal Company, upon appropriate occasions, assigned certain incidental work to carmen which included electrical work which was identical to the task of the carmen.[4] As a result of the assignment of such incidental work to members of the carmen's union, I.B.E.W. complained

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[2] A second paragraph dealt with procedures to be followed in the event of a dispute over whether or not the alleged "incidental work" comprises a "preponderant part" of the work assignment.

[3] The other three unions bound were the International Association of Machinists and Aerospace Workers, the International Brotherhood of Boiler Makers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, and the Sheet Metal Workers International Association.

[4] For example, in order for a carman to perform work on the wheels of certain rolling stock, it was first necessary to remove several bolts from an electrical drive unit in order to have working access to said wheels. The removal of these bolts, while formerly within the province of the electrical workers, would constitute "incidental work" to the carman inasmuch as it was only a small part of the work required of him on the wheels, and was within his capabilities.

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to the carrier, and discussions were had concerning the assignment of such incidental work to the carmen, following which the Union filed this suit in the United States District Court for the District of Columbia, seeking to enjoin the Washington Terminal Company from implementing the incidental work rule, claiming that the carrier was effecting a unilateral change of working conditions in derrogation of Section 2, Seventh, and Section 6 of the Railway Labor Act. The Respondent argued that the dispute was a "minor dispute" under Section 3, First(i) of the Railway Labor Act, over which the National Railroad Adjustment Board has exclusive jurisdiction, due to the fact that said dispute involved a question of application or interpretation of the newly agreed upon "incidental work rule" the dispute relating only to the question of the scope of application or coverage of the rule.[5]

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[5] The incidental work rule is referred to in section II(2) of the Memorandum of Understanding entitled "Incidental Service Rule" and is set forth in Attachment No. 1 thereto (JA 23, 24). The effect of the Memorandum of Understanding was set forth in Attachment No. 4 as follows:

> "This agreement is in settlement of the dispute growing out of the proposals served on the carriers listed in Exhibit A, B and C on or about November 8, 1968 and of the proposals served on or about November 26, 1968 by the individual carriers on organization representatives of the employees involved. . . ." (JA 26)

It is interesting to note the language contained in the carrier's Section 6 notice (JA 20), Paragraph No. 6:

> "*All* agreements, rules, regulations, interpretations and practices, however established, governing the classification of work of *mechanics*, helpers and apprentices shall be merged into three classification of work rules. The first rule shall govern the work of *all mechanics*, the second the work of *all* helpers, and the third the work of *all* apprentices. Thereafter *any* work covered by such a consolidated rule may be assigned to

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The district court entered findings of fact and conclusions of law and an order denying the injunctive relief sought by the Union, the United States Court of Appeals for the District of Columbia affirming said action in a 37-page opinion. The decision below held in essence that the case presented a question of application or interpretation of the "incidental work rule" and was thus a "minor dispute" within the meaning of the Railway Labor Act, over which the National Railroad Adjustment Board has exclusive jurisdiction.[6]

## ARGUMENT

### There Are No Special or Important Reasons for Granting the Writ

The general criteria for granting a Writ of Certiorari are set forth in Rule 19 of the Rules of this Court. As will be discussed in the following section, the decision below does not conflict with any decision of

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and performed by *any* employee of the class to which the rule is applicable irrespective of craft." (JA 20) (Emphasis supplied).

It is clear that the incidental work rule was the rule adopted as part of the settlement of the Section 6 notices exchanged by the parties, including the carriers demand for a composite mechanic for all work. In view of the history since June 16, 1946 of the crafts composed of IBEW, IAM, IBBB, SMWI, BRC and IBFO maintaining rigid, separate craft rules (Rule 27, System Federal Agreement, [JA 3]), and the use of the words "all" and "any" in the carrier's notices as pertaining to "rules" and "mechanics", the controversy herein as to which mechanics and which crafts are covered by the incidental work rule can only be resolved by an interpretation of those words contained in the agreement in light of the entire background thereto.

[6] Other litigation involving the identical question raised by Petitioner produced a similar rejection of Petitioner's claims. The Southern Pacific Transportation Company had likewise applied

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another court of appeals on the same matter, involves no new or novel theory of law not heretofore settled by this Court, and is in conformity with the provisions of the Railway Labor Act and the applicable decisions pertaining thereto.

As is demonstrated by the unanimous opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A, pages A1-A40), the events leading up to the dispute involved herein were carefully reviewed below, bringing into focus the contentions of both the Union and the carrier. The decision below proceeded to demonstrate, in accordance with the provisions of the Railway Labor Act and the decisions of this Court, as well as other courts pertaining thereto, that the assignment of certain incidental work to carmen under the circumstances involved presented a question involving the application or interpretation of an existing agreement, and was thus a "minor dispute" within the meaning of the Act, the sole jurisdiction over the same being vested in the National Railroad Adjustment Board.

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the incidental work rule to carmen, and Petitioner issued a strike call. The Southern Pacific obtained preliminary injunctive relief against the strike in the case of *Southern Pacific Transportation Company* v. *International Brotherhood of Electrical Workers*, Civil Action No. S-1699 (Ed. Cal., July 9, 1970). In that case, the District Court, after finding that the question presented a "minor dispute" granted an injunction against the strike to protect the jurisdiction of the Adjustment Board. On January 23, 1973, the United States Court of Appeals for the 9th Circuit (Nos. 26696 and 71-1390) found that the question presented involved a "minor dispute" and affirmed the District Court's Order, citing the Opinion issued by the United States Court of Appeals of the District of Columbia Circuit, which is herein challenged by Petitioner.

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The Union's petition assumes that the dispute is a "major" one and then proceeds to apply legal arguments to its assumed conclusion. The Union's approach, however, begs the basic question presented to the courts below, *i.e.*, under the circumstances here involved, whether the dispute was "major" or "minor" under the dichotomy which has arisen under the Railway Labor Act.

The courts below found the dispute to be a "minor" one, and a legal analysis of such findings shows the same to be in accord with the settled law which has been pronounced in the many cases dealing with the criteria to be applied in the analysis of whether the dispute is "major" or "minor".

## I

### The Decision Below Conforms to the Railway Labor Act and the Unanimity of Decisions Relating Thereto

The sole question involved herein is whether the dispute was "major" or "minor", as those terms are used in connection with the Railway Labor Act.

In *Elgin, J. & E. Ry.* v. *Burley,* 325 U.S. 711 (1945), this Court discussed the distinction that was made by the Act between ". . . disputes concerning rates of pay, rules or working conditions . . ." and ". . . disputes growing out of . . . the interpretation or application of agreements covering rates of pay, rules or working conditions." Applying the industry appellations of "major" and "minor", the Court then discussed the criteria for each (325 U.S., at page 723):

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing

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agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event, the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future."

The criteria discussed in *Elgin, supra,* have been followed in all the circuits where the question has arisen.[7] See *Butte, A. & P. Ry. Co.* v. *Locomotive Firemen,* 268 F.2d 54 (9th Cir., 1959), cert. denied, 361 U.S. 864 (1959); *Railway Conductors & Brake.* v. *Spokane, P. & S. Ry.,* 366 F.2d 99 (9th Cir., 1966), cert. denied, 385 U.S. 1025 (1966); *Locomotive Firemen* v. *Union Pac. R.R.,* 423 F.2d 673 (9th Cir., 1970), cert. denied, 400 U.S. 830 (1970); *Railway Labor Executives Ass'n.* v. *A.T.&S.F. Ry. Co.,* 430 F.2d 994 (9th Cir., 1970), cert. denied 400 U.S. 1021 (1971); *Switchmen's U.* v. *Southern Pac.,* 398 F.2d 443 (9th Cir., 1968); *Rolfes* v.

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[7] The decisions of this Court cited by Petitioner (*Detroit & T.S.L.R.R.* v. *Locomotive Firemen,* 396 U.S. 142 (1969) and *Chicago & N.W.R.R.* v. *United Transp. U.,* 402 U.S. 570 (1971) in no way dilute the holding of *Elgin.* These cases are totally distinguishable in that they involve not a question of whether a dispute was major or minor, but rather involve the question of legal duties and obligations of the parties involved in a major dispute.

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*Dwellingham,* 198 F.2d 591 (8th Cir. 1952); *Northeast Airlines, Inc.* v. *Airline Pilots Ass'n. Int'l.,* 442 F.2d 246 (8th Cir. 1970); *United Transp. U.* v. *Burlington N. Inc.,* 458 F.2d 354 (8th Cir. 1972); *Illinois Cent. R.R.* v. *Locomotive Engineers,* 422 F.2d 593 (7th Cir. 1970); *United Transp. U.* v. *Penn Cent.,* 443 F.2d 131 (6th Cir., 1971), cert. denied 404 U.S. 938 (1971); *Locomotive Firemen* v. *Detroit & T. S. L. R.R.,* 421 F.2d 660 (6th Cir., 1970) cert. denied 398 U.S. 927 (1970); *United Industrial Workers* v. *Galveston Wharves,* 351 F.2d 183 (5th Cir., 1965); *Ruby* v. *T A C A Int'l. Airlines,* 439 F.2d 1359 (5th Cir., 1971); *Norfolk & P.B.L. R.R. Co.* v. *Railroad Trainmen, Lodge 514,* 248 F.2d 34 (4th Cir., 1957), cert. denied 355 U.S. 914 (1958); *Div. 14, Railroad Tel.* v. *Leighty,* 298 F.2d 17 (4th Cir. 1962); *Seaboard World Airlines, Inc.* v. *Transport Workers U.,* 425 F.2d 1086 (2nd Cir., 1970); and *Southern Ry.* v. *Locomotive Firemen,* 127 U.S. App. D.C. 371, 384 F.2d 323 (D.C. Cir., 1967).

Indeed, the court below relied specifically upon *Elgin,* (Appendix, pages A25-A28), and its analysis of the issues was specifically predicated upon the *Elgin* test (See Appendix A28). Moreover, the court below also acknowledged the formulation used by several of the circuits in cases where the narrow question was presented as to whether a particular action in light of an existing agreement is a "major" or a "minor" dispute, said formulation being that a dispute is major if ". . . it is nowise contemplated or arguably covered by the agreement . . ." and minor if ". . . it is expressly and arguably predicated upon the terms of the agreement" or "reasonably susceptible to the interpretations sought by the parties . . .". See *Switchmen's U.* v. *Southern Pac., supra; United Transp. U.* v. *Burling-*

*ton N. Inc., supra; United Industrial Workers* v. *Galveston Wharves, supra; Ruby* v. *T A C A Int'l. Airlines, supra;* and *Southern Ry.* v. *Locomotive Firemen, supra.*

Thus, it is respectfully submitted that the decision below is in conformity with the provisions of the Railway Labor Act and the decisions of this Court and the other circuits pertaining thereto. No new or novel question is presented in the petition, and there is no conflict between the circuits on cases involving the same matter.

## II

### The Decision Below Is Manifestly Correct

The Union asserts that the carrier's implementation of the "incidental work rule" constituted a unilateral change in working conditions. However, the facts of this case demonstrate that the changes in working conditions, namely the assignment of incidental work under certain circumstances, *was agreed to* by both the Union and the carrier pursuant to the Memorandum of Understanding and Public Law No. 91-226.

The Union has never claimed that Congress was without power to enact Public Law No. 91-226, which is understandable in view of the fact that it actively supported the legislation.[8] As to the "incidental work

[8] As to the parties herein, the "incidental work rule" was arrived at through the normal bargaining procedures under the Act. It was only the last-minute refusal of the Sheet Metal Workers to formally sign the same that occasioned the necessity of Public Law 91-226. Thus, the legislative history of that law is of interest only in determining the scope of intended application of the incidental work rule, which was one of the elements discussed by the court below in finding that the scope of the agreement encompassed the carmen.

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rule", the Union's negotiators originally authored said rule, and at no time was there any attempt to restrict the terms "crafts" or "mechanics" covered thereby.

Thus, the controversy does not involve the unilateral change in working conditions, nor is there any claim by the Union that the carrier cannot assign to other signatory crafts or mechanics certain electrical work which is "incidental". The Union's only claim is that such "incidental" electrical work may not be assigned to carmen mechanics, thus narrowing the controversy to one of the proper *application* or *interpretation* of the scope of the "incidental work rule". Such a controversy over the application or interpretation of existing agreements clearly falls within the definition of "minor dispute" under the *Elgin* test.

The exhaustive decision of the court below clearly indicates that it did not undertake to determine the merits of the dispute, reserving that question to the National Railroad Adjustment Board, whose jurisdiction over such a question is exclusive. Rather, the court below carefully reviewed the facts and chronology, the "incidental work rule", the legislative history of Public Law 91-226, together with the contentions of the parties, finding in each instance that the controversy presented a "minor dispute" under the test prescribed by *Elgin* as well as other applicable cases.

The argument advanced by the Union seems to overlook the fact that it had just recently agreed to the "incidental work rule" before the implementation thereof by the carrier. However, the well reasoned decision below carefully takes into account all relevant considerations, both factual and legal, and is manifestly in conformity with the mandates of the Railway Labor Act and the relevant decisions pertaining thereto.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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